Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MANVILLE SALES CORPORATION and
MANVILLE CORPORATION,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent,

and

MANVILLE SALES CORPORATION,

Petitioner,

v.

CHARLES MITTE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

FULBRIGHT & JAWORSKI L.L.P.

BRIAN S. GREIG
600 Congress Avenue,
Suite 2400
Austin, Texas 78701
Telephone: (512) 474-5201
Telecopier: (512) 320-4598

W. WENDELL HALL
(Counsel of Record)
300 Convent Street,
Suite 2200
San Antonio, Texas 78205
Telephone: (210) 224-5575
Telecopier: (210) 224-8336

Counsel for Petitioners,
Manville Sales Corporation and Manville Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether, in an Age Discrimination in Employment Act case, a district court has discretion under FED. R. CIV. EVID. 403 to exclude from evidence non-probative, age-related remarks or whether the exclusion of such evidence "improperly usurp[s] the role of the fact finder."

2. Whether the exclusion from evidence of a few non-probative, age-related remarks necessarily effects the substantial rights of the plaintiff thereby requiring a second trial on the merits.

3. Whether the failure to review the district court's jury question under the heavy burden imposed on the complaining party and the failure to consider the question in the context of the jury charge as a whole departs from Fifth Circuit precedent.

LIST OF ALL PARTIES

The following are parties in this case:

Equal Employment Opportunity Commission

Charles Mitte

Manville Sales Corporation

Manville Corporation

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OPINIONS BELOW

This case arises from the final judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, in Civil Action Nos. 4:88-CA-0905-K and 4:89-0266-K. The opinion for the United States Court of Appeals for the Fifth Circuit is reported at 27 F.3d 1089 (5th Cir. 1994). Copies of the district court's judgment and the Fifth Circuit's opinion are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The date of the entry of the judgment sought to be reviewed is September 16, 1994. The motion for rehearing and suggestion for rehearing en banc was overruled September 6, 1994. This Court has jurisdiction to review the opinion and judgment of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

STATEMENT OF THE CASE

This is an appeal from a final judgment upon a jury verdict in favor of Manville Sales Corporation and Manville Corporation (collectively "Manville") brought by the Equal Employment Opportunity Commission ("EEOC") and Charles Mitte under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1994). Mitte filed his action alleging that he was unlawfully discharged from Manville because of his age (55), R.1: 1, and the EEOC later filed a separate action against Manville alleging the same violation. R.2: 1. The district court consolidated the actions, R.1: 35-36, and on the sixth day of a trial to a jury, the jury returned a verdict in favor of Manville, R.6: 74, and the district court rendered a judgment accordingly. R.7: 51. The EEOC and Mitte timely appealed the judgment. R.7: 52, 1334. A panel of the Fifth Circuit Court of Appeals reversed the judgment of the district court and remanded the case for a second trial. The basis for reversal of the

district court's judgment was (1) the exclusion of two non-probative, age-related remarks and (2) an allegedly improper jury interrogatory which purportedly required the jury to find for Mitte only if it found discrimination in the general decision to realign Mitte's sales territory instead of some focused decision to terminate Mitte which did not occur.

ARGUMENT FOR GRANTING THE WRIT

This case centers around the business decision made by a company emerging from bankruptcy in 1986 to eliminate one of its rural Texas sales territories by consolidating it with two other existing Texas territories. It also involves the decision of a 57-year old man to eliminate the position held by Charles Mitte, age 55, as a part of the consolidation of sales territories. Mitte was subsequently rehired for an available position in the Dallas area. After a trial of conflicting evidence regarding the relative strengths and weaknesses of Mitte's sales territory, the jury determined that Manville was not motivated to eliminate his territory because of Mitte's age.

The district court correctly excluded from evidence the two arguably age-related comments made by Morris because the comments were vague, indefinite, and generally without temporal identification. Furthermore, Mitte failed to show any nexus between the comments and Robert Bruntrager, who made the decision to eliminate Mitte's sales territory or to the decisionmaking process. The comments were stray remarks that are not admissible into evidence and, even if admissible, the danger of unfair prejudice to Manville far outweighed any probative value. Finally, any error in the district court's broad discretion is harmless error because Mitte's counsel elicited testimony from several witnesses regarding other "age-related" remarks allegedly made by Morris.

The district court's jury instruction correctly required Mitte to establish in this reduction-in-workforce case, that he was "clearly better qualified" than those employees

who were retained. It is entirely consistent with the Fifth Circuit's decision in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985). The district court's interrogatory to the jury that required Mitte to prove that Manville discriminated against him on account of his age when Manville realigned the Texas sales territory is correct. When the question is read in conjunction with the charge, it more than adequately presents the contested issue to the jury.

The district court's evidentiary rulings were correct and its submission of the charge to the jury was correct. The jury simply did not believe that Mitte was discharged in violation of the ADEA, particularly in light of the overwhelming economic crisis that Manville faced in the 1980's and the dramatic reduction of its workforce.

FACTUAL BACKGROUND

In August 1982, Manville filed for Chapter 11 bankruptcy protection as a result of massive asbestos litigation. JX at 7; R.12: 156. With the declining economy in the 1980's, Manville's very survival was at stake. R.13: 131; DX 14.[1] Manville's bankruptcy, the substantial funding requirements for the trust for the asbestos litigation plaintiffs,[2] and the poor economy forced Manville to become more cost effective. R.12: 156-57. In 1979, Manville employed 35,000 people, and by 1992, Manville's workforce decreased to 15,722. R.14: 92; DX 3.

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[1] *See Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994) ("It is clear from the record that Manville has serious financial problems and there was a legitimate management decision to reduce the work force throughout the company. There is nothing in the record to indicate that such was simply a pretext and that Manville's true reason for discharging Palochko was the fact that he was 53 years of age.").

[2] Manville projected 45,000 claimants with a $40,000 cost per claim or a total of $1.8 billion in asbestos-health liabilities. DX 61 at 381; R.12: 157.

In 1985, William Sells, employed by Manville for 30 years, was charged with the onerous responsibility of preparing a 120-year old company to survive its bankruptcy and re-emerge as a viable company after bankruptcy. R.12:108, 313. With respect to the market, Sells testified that while the demand for fiberglass always exceeded supply, in 1985 that began to change due to competition and inflation. R.12: 115-16. Selling prices in 1985 were at 1982 levels, and a sharp decline occurred in the first quarter of 1985. DX 61 at 352.[3] As a result, it was necessary to expand the cost reduction effort to the sales side of the company. R.12: 117-18.[4]

In 1985, Sells scheduled a marketing meeting of all sales district managers, market managers and headquarters personnel to develop specific strategies. R.12: 116, 122-23; DX 61 at 356.[5] During this important meeting,

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[3] Mitte testified that in September 1985, the economic picture was not bright, in October 1985, general market conditions were not conducive to selling insulation, in November 1985, the economic forecast for the near future was "gloomy" and in December 1985, homes were not selling due to the economic conditions. R.11: 29-31. At the time Mitte thought the first quarter of 1986 would be like the last quarter of 1985. R.11: 32. Charles Hinton, a sales representative with a territory adjacent to Mitte's territory, testified that 1985 was an extremely difficult year, but that 1986 was the worst year with housing starts gone, builders going out of business, the rise in interest rates, and the oil bust. R.14: 24.

[4] Manville had reduced its costs on the production side of the company in 1982. R.12: 118. The production was now contributing to profits, and now the sales side had to reduce its costs and contribute to profits. R.12: 128.

[5] At the May 1985 marketing meeting, Sells distributed Tom Peters' book, *Thriving on Chaos*, to convey to the Manville sales force that to be a valuable company employee, one was required to embrace change and to continuously search for ways to make things better. R.12: 130. Also, Peter's book emphasized the need to be sensitive to "the greater good", which in Manville's case

Lonnie Morris, Mitte's district manager, observed Mitte reading a newspaper and picking hair out of his ears. R.13: 140.

From 1983 to 1986, sales for Mitte's district (the south central district) declined from $63.9 million (1983) to $19.3 million (1986). R.12: 164; DX 72. Mitte conceded that his territory was "reeling as if from a knock-out punch". R.11: 29. While sales were declining sharply, the cost of a sales call increased by 17.7% from 1980 to 1984 (or from $130 per call in 1980 to $200 per call in 1984). R.12: 128-29; DX 61 at 376. Because the selling price of Manville's product was not keeping up with the cost of the product to Manville from 1980-1984, Manville reviewed all overhead selling and administrative expenses because the current trend would put Manville out of business. R.12: 126-27. Accordingly, Sells wanted the sales representatives to focus on telemarketing as a method of reducing costs. *Id.*

Soon after the meeting, Manville issued to division general managers a memorandum regarding "Business Charters". R.12: 132-33; DX 21. The memo instructed the division general managers to (1) improve working capital control and asset turnover, and (2) reduce salaried personnel and streamline organizational structures, including reductions in levels of management. R.12: 133; DX 21. Manville wanted to reduce overhead expenses (which included compensation of sales representatives) from 14.5% in 1986, to 13.0% in 1990. R.12: 133-34, 162. One way to reduce overhead expenses was to reduce the number of sales positions which would eliminate compensation. R.12: 163. Mitte admitted that it was not unreasonable for Manville to reduce the number of salesmen in Texas because the market was in "sorry shape". R.11: 33.

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translated into becoming more cost effective to improve Manville's competitive status. R.12: 131. In short, Sells' message was that for Manville to remain a viable company, the company had to fundamentally change the way it did business. R.12: 132.

In September 1985, Sells selected Robert Bruntrager to become general sales manager for the entire sales force. R.12: 128, 150; R.13: 57. Sells told Bruntrager that he wanted to increase productivity of the sales representatives. R.12: 140. One of Bruntrager's responsibilities was to become more knowledgeable about the sales force and to review the operations of each district. R.12: 145. Bruntrager became familiar with the yearly appraisals of the sales representatives, and he began to have personal contact with the sales force as well. *Id.* Manville was averaging $3 million of sales per sales representative, and Manville wanted to increase the sales per representative to $4 or $5 million. R.12: 140-41. To accomplish this goal, a reduction-in-force and a realignment of territories was necessary. R.12: 141.

Prior to the reduction in force, there were eight districts, eight sales offices, eight regional managers and 118 sales representatives. R.12: 157, 160. Sells and Bruntrager spent a day and a half reviewing the geographical distribution of the sales district and the territories within each district with the view of reducing personnel to reduce costs with the least amount of impact possible on the employees. R.12: 159, 162. To make judgments about sales representatives, Sells relied on a combination of the judgment of the district managers and Bruntrager. R.12: 143-44. No one factor alone was indicative of who was a better sales representative. R.12: 142-45.

Because of an overall morale problem, Bruntrager called each regional sales manager and asked them to evaluate their sales representatives. R.12: 159. Bruntrager instructed them to identify the number of salesmen and their responsibilities and to justify why a salesman should be retained. R.12: 160. In January 1986, each regional manager sent Bruntrager a written report. *Id.*

Bruntrager received a written report from Lonnie Morris (Mitte's district sales manager)[6] which recommended that Manville consolidate three adjacent territories into two territories, thereby eliminating one sales representative. R.12: 167; DX 123. Morris knew with the declining sales in his district that Manville could not afford all three salesmen. R.13: 149. Significantly, Morris also recommended closing his own office and eliminating his secretary's job. R.12: 173.

Bruntrager used past performance and future needs to determine who was the least effective of the sales representatives. R.13: 30. Bruntrager had independent knowledge of Mitte and Charles Hinton and Lorin Lichten as salesmen (the three salesmen in the district) and relied on that knowledge in evaluating Morris' recommendations. While Mitte was not a bad salesman, he was not in an area of growth and he had not established a base of commercial accounts unlike the other two salesmen in the district, Charles Hinton and Lorin Lichten. R.12: 169. Morris recommended that Manville consolidate the three adjacent territories into two territories and eliminate one sales representative position. Morris proposed splitting Mitte's territory (south Texas) and folding it into the remaining two territories (the Austin/Waco market and the Houston market). R.13: 150, 151, 153. Bruntrager testified that it did not make sense to disrupt developing commercial markets in Austin, Waco and Houston by terminating either Hinton or Lichten, and then impose Mitte on either of those markets since Hinton and Lichten had established relationships in those markets. R.12: 169.[7]

Bruntrager described Lichten as aggressive, innovative, computer literate, and an excellent communicator.

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[6] Morris had been Mitte's supervisor since August 1982. R.10: 67.

[7] The realignment of the territories is illustrated by two maps of the territories before and after the realignment of Mitte's territory. See appendices 4 and 5.

R.13: 23. Lichten also received an award from Tom Stevens, Manville's Chief Executive Officer, for exemplary performance. R.13: 23; R.14: 60. Long-term, Bruntrager thought that Lichten and Hinton offered strengths that Mitte did not offer. R.13: 49. Bruntrager also stated that even though Mitte had been employed longer than Lichten and Hinton and had some longer customer relationships, that long-term the rural independent dealers that Mitte focused on were not the focus of Manville's market. R.13: 45.

Mitte also lost Manville's largest single account in San Antonio, Bexar Insulation Company, because Mitte made some representations to Joe Dawson, the owner of Bexar Insulation, that were not true. R.13: 53, 129-33, 189; DX 85 at 1; DX 24.[8] After Mitte retired, however, Hinton was able to gain Dawson's confidence, and Manville regained Bexar Insulation's business. R.14: 35.

Morris testified that the following factors caused him to opine that Mitte was less effective than Lichten or Hinton; Mitte was inflexible, R.11: 45, 49; R.13: 106, 114, 144;[9] he failed to work with architects who were considered to be a significant source of the company's customers, R.13: 103-04, 120; R.11: 139-40; DX 105; he lacked the adaptability to fit into the company's future, R.12: 169; R.13: 106, 144-45; that eliminating Mitte's position

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[8] Upon confronting Mitte about the misrepresentations, Mitte became "abusive and violent" and then Dawson kicked Mitte out of his office. R.13: 190. While Morris forced Mitte to act to try and keep the Bexar Insulation business, R.13: 130-31, Mitte would occasionally go by Bexar Insulation "open the door and throw [sales materials] in" and leave. R.13: 190. Dawson thought that Mitte was less than average as to three traits: understanding his product, knowing his industry, and having integrity. R.13: 185.

[9] Even Mitte conceded that Morris had repeatedly told him that his approach to selling products needed to change. R.11: 7. This is consistent with each evaluation from 1980 to 1985. DX 202.

would be less disruptive to customer relationships than eliminating Lichten's or Hinton's positions, R.13: 150-51; Mitte was intimidated by large volume accounts and upper echelon management personnel and tended to call on people with whom he was comfortable, R.13: 106-07); Mitte's expenses were very high, R.13: 181-82; DX 12; Mitte failed to call on the military bases in San Antonio, R.13: 155; Mitte "was inclined to adhere too closely to established and familiar work patterns", R.13: 106; he did not grasp the opportunities available and that he needed a lot of support and coaching, R.13: 95. Additionally, from 1984 to 1986, Mitte received the lowest pay raise as compared to Hinton and Lichten. DX 202.[10]

Bruntrager, age 57, made the decision to eliminate Mitte's (age 55) position. R.13: 145. While Morris provided Bruntrager with a written recommendation, Bruntrager made the decision to approve Morris' proposal and to eliminate Mitte's territory. R.13: 145, 146, 148-49.[11] Bruntrager considered Morris' report carefully,

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[10] The EEOC relies on Mitte achieving or exceeding his "exceptancy." EEOC brief at 5. "Expectancy is "the planned sales volumes assigned to a territory." DX 18 at 226. The evidence established that the expectancy for a sales representative was only one factor to use in comparing one salesman to another. R.11: 145, 148, 152-53; R.12: 145; R.13: 21.

[11] Manville respectfully takes exception to that portion of the court's opinion that suggests that Manville's statement that Morris was not a decisionmaker was "a blatant misstatement of the record . . . . " 27 F.3d at 1094. It is not a misstatement. The court cites to a memorandum to Bruntrager from Morris (DX 123) that **recommends** the elimination of Mitte's territory. *Id.* However, the court fails to recognize that the testimony is undisputed that Bruntrager had the final authority and made the decision to terminate Mitte's employment. R.12: 170-71; R.13: 145, 146, 148-49. While Morris had input in the decision-making process – a fact not disputed by Manville – Morris was not "a" or "the" decisionmaker. Bruntrager was the decision-maker with respect to Mitte's termination.

and based upon his own independent knowledge of Mitte, Lichten and Hinton, Bruntrager made the decision to eliminate Mitte's position. R.12: 170-71. Bruntrager testified unequivocally that Mitte's age was not a factor in his decision. R.12: 171.[12] As a result, part of Mitte's former sales territory was reassigned to Lorin Lichten (age 33) and part was reassigned to Charles Hinton (age 42). JX 1 at 6.

As a result of the reduction-in-force, approximately 18 or 19 sales representatives were terminated, including Mitte. R.12: 160. Significantly, *the average age of the work-force increased after the reduction-in-force.* R.12: 161; DX 10. As a matter of fact, 10 to 12 of the sales representatives terminated (more than half) were younger than Mitte. R.13: 7, 41. Additionally, the overhead expenses were reduced from 12.8% in 1986, to 10.9% in 1988. R.12: 165; DX 22.

On March 16, 1986, Morris flew to Victoria to notify Mitte that his position with Manville was being eliminated. R.10: 75-77; R.13: 177.[13] Because of Manville's

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[12] While the EEOC recites favorable testimony regarding Mitte's performance as compared to Lichten or Hinton (EEOC brief at 10-13), the jury heard *all of the evidence* and chose to believe Manville – that age was not a factor in eliminating Mitte's position.

[13] Shortly thereafter, Mitte contacted Carolyn McLane, employed in employee relations, and Virg Setzer, director of employee relations, and expressed concern whether the people in Manville's national headquarters in Denver knew of his separation of employment. R.10: 79-80; R.14: 69, 93-94. Mitte was informed by both McLane and Setzer that Denver was aware of the situation. R.14: 75, 103. After meeting with Morris, Bruntrager, Sells and corporate attorney Wayne Palmer, Setzer went back to Mitte and advised him that the decision was final and that in his judgment it was a correct business decision. R.10: 80; R.14: 97, 103; DX 203. In handling the investigation, Setzer did not find any evidence whatsoever that age was a factor in the decision to eliminate Mitte's position. R.14: 97. Moreover,

severance pay, Mitte received almost one year of pay based upon his length of employment. R.11: 39; DX 138. Manville also provided for the continuation of his benefits at his election. R.10: 90; R.14: 70; PX 9; DX 140. Finally, as a part of Manville's overall approach to its workforce reductions, Manville provided to Mitte free substantive outplacement services. R.14: 70; PX 9. Mitte, however, refused any of the outplacement services offered by Manville. R.10: 91; R.11: 38-39; R.14: 72, 98.

Three weeks later, on April 8, 1986, Mitte filed his charge of discrimination alleging, for the first time, age discrimination as the reason for the elimination of his sales position. PX 7. After several jobs,[14] Mitte was offered an opportunity with Manville in Chicago, but he quickly rejected any opportunity in Chicago.[15]

Mitte never raised the issue of age discrimination with any of the Manville employees that he talked to during this time period. R.11: 12, 14; R.13: 7; R.14: 69, 70, 76, 77, 94, 98, 103. Mitte stated that he mentioned age discrimination to McLane in a telephone conversation, R.11: 13, but Mclane testified that Mitte never mentioned age discrimination to her. R.14: 69, 70, 76, 77.

[14] In May 1986, Mitte worked for Guardian Insulation as a distributor for three to four months. R.10: 82, 83. Mitte quit, and in August 1986, Mitte went to work for his brother at Intercontinental Life Insurance Company in Elizabeth, New Jersey, as a managing director recruiting independent sales agents. R.10: 82. He moved to Austin to continue the same employment for two to three months, R.10: 82, and then he moved to Victoria and continued the same work until February 1989. R.10: 82, 83. Mitte then quit, and then went to work for Glenn's for Men in Victoria in February 1989 through March 1990. R.10: 83.

[15] After Mitte's retirement, Manville was under a hiring freeze; however, about a year and one-half after filing his charge of age discrimination (in late 1987), a sales representative in Chicago quit. R.13: 8. Bruntrager then contacted Don Korte, who was the district manager of the region that included Chicago, and discussed with him opportunities for Mitte. *Id.* Bruntrager then contacted Mitte, by telephone and by letter dated

In May or June 1991, Mitte did interview for a position with Manville in San Antonio, Texas, but ultimately he was not offered the job. R.11: 78; R.13: 14. Later, in December 1992, Manville made the decision to hire another sales representative for the Dallas market due to the impending retirement of one of the sales representatives and offered it to Mitte. R.13: 14, 18. The job was contingent upon Mitte relocating to the Dallas area. R.10: 86. Mitte accepted and began his employment on August 1, 1992. R.13: 18, 19, 20; JX1 at 10. Mitte was not required to interview for the Dallas position because he had recently interviewed for the San Antonio position, and Bruntrager thought it was unnecessary to interview him again. R.13: 19.

Bruntrager observed that in 1986 Mitte was reluctant to make changes that everyone at Manville was forced to make due to the poor economic conditions, but that by 1992, Mitte was more open to the new selling techniques that were necessary in today's market. R.13: 20.

December 1, 1987, about the Chicago position. *Id.*; DX 90. At the time, Mitte had moved from Victoria, Texas, to Elizabeth, New Jersey, to work for his brother. *Id.* Bruntrager stated that Chicago was a major market for Manville, that the severity of the economic conditions in Texas and Oklahoma made it impossible to expand the sales group in that region, and that Manville would be pleased if Mitte would interview with Korte at Manville's expense. R.11: 41; R.13: 11-12; DX 91. Bruntrager discussed the opportunity with Mitte, but Mitte stubbornly told him that Chicago was out of the question and that he wanted his "old territory" back. R.11: 9.

By letter dated December 3, 1987, Bruntrager also confirmed with Mitte that he understood that Mitte was not interested in the Chicago position, but he left Mitte the opportunity to change his mind until December 14, 1987. R.13: 12-13; DX 91. Bruntrager testified that Korte, who worked for Bruntrager, would have given Mitte favorable consideration. R.13: 55. Mitte, though, never responded to Bruntrager. R.13: 13.

ARGUMENT

I. The District Court Correctly Concluded – Within its Discretion – That the "Age-Related" Remarks Were Not Admissible Under Rule 403.

The Fifth Circuit incorrectly reverses this case based upon two "age-related" remarks made at an unspecified time over a four year period which the district court excluded from evidence. Even if the remarks are relevant, the court's analysis of the district court's ruling is fundamentally flawed. The issue is not whether stray, age-related remarks are admissible or inadmissible *per se*, but whether the district court committed an abuse of discretion in excluding non-probative facts potentially prejudicial and unrelated to the decision at issue. The Fifth Circuit erroneously holds that such remarks are admissible and may not be excluded from evidence. 27 F.3d at 1093 n.2.

A. The excluded evidence.

Outside the presence of the jury, Mitte's counsel asked Mitte, "from the period of time when Mr. Morris became your supervisor in 1982 until you were discharged in 1986, did he ever do or say anything that would cause you to believe that he might think or did think that you were too old to do the job?" R.10: 112-13. During this four year period of time, Mitte related the following comments purportedly made by Morris:

1. that Mitte was incapable;
2. that he was old and inflexible;
3. that he was a dummy; and
4. that during a dinner with Margaret Cole and Morris, Morris "was bragging to us about how he jumped that old man about smoking his pipe"; and that one time he pulled down Mitte's winter hat and said "old man's hat".

R.10: 112-13. Mitte also volunteered that "even though there was a lot of camaraderie among the salesmen and

we would, you know, tease each other, this didn't happen with district management." R.10: 114.

Mitte's counsel also elicited from Gene Smith that one time during a trade show in Arlington, Texas, in 1986, he heard Morris remark about a sales representative from another company (not Mitte), "See that old man there. You're not going to believe this, but I interviewed him once." R.11: 115. Mitte was not present. *Id.* Mitte's counsel also presented testimony of Shirley Hoehn that she had heard Morris refer to Mitte as an old man on occasion, but that she thought that the reference was made "in jest". R.12: 77.

After presenting these few scattered, undated, arguably age-related, but purely descriptive comments allegedly made by Morris *at unspecified points up to four years earlier*, Mitte's counsel moved that the comments be admitted into evidence, R.10: 114, even though he had completely failed to demonstrate that Morris controlled the decision to discharge Mitte, that the comments were more than vague in time and meaning. The EEOC completely failed to establish admissibility by showing that the comments had any nexus to Mitte's separation of employment. The district court correctly sustained Manville's objection. R.10: 114.

B. Stray remarks are insufficient to establish discrimination.

The Fifth Circuit, and the other circuits,[16] have held that age-related comments in the workplace are "stray

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[16] *E.g., Birckbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994); *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025 (8th Cir. 1994); *Roy v. Univ. of Hawaii*, 30 F.3d 139 (9th Cir. 1994) (unpublished); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1989); *Bashara v. Black Hills Corp.*, 26 F.3d 820, 824 (8th Cir. 1994); *Robinson v. PPG Indus., Inc.*, 23 F.3d 1159, 1165 (7th Cir. 1994); *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531

remarks" which are insufficient to prove discrimination if they are "vague and remote in time and administrative hierarchy." *Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992) (quoting *Guthrie v. Tifco Industries*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992)).[17] In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), a sex discrimination case, Justice O'Connor stated:

> Stray remarks in the work place . . . cannot justify requiring the employer to prove its . . . decisions were based on legitimate criteria. Nor can statements by non-decision makers or statements by decision makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard.

109 S. Ct. at 1804 (O'Connor, J., concurring).

Applying these standards, the district court did not abuse its discretion in refusing to admit Morris' alleged stray remarks into evidence. Morris' alleged remarks constituted vague and indirect references to age, the remarks were remote in time from Mitte's discharge (as much as

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(10th Cir. 1994); *Boyle v. Mannesmann Demag Corp.*, 991 F.2d 794 (6th Cir. 1993) (unpublished); *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993); *Fuentes v. Perskie*, 32 F.3d 759, 767 (3d Cir. 1994); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992); *see also EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 925 (11th Cir. 1990) (recognizing Justice O'Connor's concurring opinion that "stray remarks" do not constitute evidence of discrimination).

[17] In *EEOC v. MCI Telecommunications Corp.*, 820 F. Supp. 300 (S.D. Tex. 1993), the court held that "to rise above the level of a stray remark and constitute direct evidence of discrimination, a remark must: (1) be made by the decisionmaker or one whose recommendation is sought by the decision maker; (2) be related to the specific employment decision challenged; and (3) be made close in time to the decision." *Id.* at 309 (citing *Turner v. North Am. Rubber, Inc.*, 979 F.2d at 59).

four years), and Morris was not responsible for the decision to terminate Mitte.

C. Rule 403 gives the district judge broad discretion to exclude stray remarks.

A district judge's ruling under Rule 403[18] "depends greatly on the trial judge's perception of the position of the parties, the exigencies of the case, and the likely effect of the contested evidence on the jury. *United States v. Gonzalez-Lira*, 936 F.2d 184, 191 (5th Cir. 1991) (quoting FED. R. CIV. EVID. 403 Advisory Committee Note)). As such, "the trial judge is given great deference [in making a Rule 403 determination]; the court of appeals will reverse the decision only upon a *clear showing* that the trial judge has abused his *considerable* discretion." *Id.* (emphasis added).

> If judicial self-restrain is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.

Glass v. Philadelphia Elec. Co., 34 F.3d 188, 199 (3d Cir. 1994) (Alito, J., dissenting) (quoting *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978)); *see Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 21 (1st Cir. 1994) ("only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold record, reverse a district court's [Rule 403] judgment"); *Sims v. Mulcahy*, 902 F.2d 524, 531 (7th Cir.), *cert. denied*, 498 U.S. 897 (1990) ("only in an extreme case are appellate judges competent to second-guess the . . . trial judge); *see also* 10 MOORE'S FEDERAL PRACTICE

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[18] FED. R. CIV. P. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

§ 403.02[3] (1994) ("trial judge's discretion is upheld in all but rare cases of egregious abuse.").

Here, the Fifth Circuit failed (1) to explain why the district court abused its discretion in excluding the stray remarks (or why the court's ruling was arbitrary and capricious),[19] and (2) failed to delineate, for future cases, under what circumstances such stray remarks would be inadmissible under Rule 403. As demonstrated below, the court's analysis is circular and avoids the real question presented: whether the district court committed an abuse of discretion in excluding the evidence and, if so, whether the error was one that effected the substantial rights of Mitte or resulted in substantial prejudice to him.

It was the EEOC's burden on appeal to establish that the district court committed an abuse of discretion in excluding the evidence under Rule 403. Under Rule 403,

> *[a]lthough relevant,* [which Manville assumes for purposes of this petition] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. CIV. EVID. 403 (emphasis added). In this case, the district court exercised its broad discretion and agreed with Manville's argument that the stray, "age-related" remarks were not admissible under Rule 403. While one may argue that reasonable minds may differ as to whether the Rule 403 balance tilts in favor of admission or exclusion of the stray remarks, the Fifth Circuit's function is not to balance the Rule 403 factors, but to afford substantial deference to the balance struck by the trial

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[19] *See Wilbur v. ARCO Chem. Co.*, 974 F.2d 631, 635 n.7 (5th Cir. 1992) (noting that the difference between "abuse of discretion" standard of review and the "arbitrary and capricious" standard of review is semantic, not substantive).

judge. If the Fifth Circuit followed the appropriate standard, then the district court's ruling on the stray remark evidence must be sustained. The trial judge's ruling was not an abuse of discretion nor was it arbitrary or capricious, and this case is certainly not the extreme case in which the appellate judges may properly second-guess the judgment of the trial judge.

D. Morris' alleged stray comments were vague, indirect, and temporally distant from Mitte's discharge.

To be probative of discriminatory intent, the age-related comment cannot have been too vague or indirect. *Guthrie v. Tifco Indus., Inc.*, 941 F.2d at 379. In *Fowler v. Carrollton Public Library*, 799 F.2d 976, 984 (5th Cir. 1986), the Fifth Circuit followed the temporal strictures and sponsorship requirements in holding that only comments *made by* or *condoned by* a decision-maker *at the time the decision is made* are relevant:

> Because Mjaaland [the supervisor] had authority to fire Fowler [the employee], evidence of his use of such epithets was probative of his motivation toward Fowler *about the time of her termination*. The conduct of coworkers without such authority over Fowler is not relevant to her ADEA charge, except to the extent it occurred in Mjaaland's presence or with his knowing acquiescence, as further corroboration of his intent.

Id. at 984.

There have been many instances in which the circuit courts have held that stray age-related remarks not directly related to the decision to terminate are insufficient to support an inference of discrimination, even when made by the employee's direct supervisor.[20] By

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[20] *See Atkin v. Lincoln Property Co.*, 991 F.2d 268, 272 (5th Cir. 1993) (statements made to an employee one year prior to his

comparison, Morris' alleged stray remarks in this case have an even weaker nexus, if any, to the discharge decision; therefore, the decision to exclude the remarks

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discharge that he was "getting up there in years" and that it would be a good idea for him to retire, held not probative of age discrimination); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993) (questions regarding ages of employees and whether any older employees intended to retire soon, statement to employee that if he were his age he would be out seeing the world, and not to recommend people over 35 for new sales positions, not probative of age discrimination in employee's termination); *Waggoner v. City of Garland*, 987 F.2d 1160, 1164 (5th Cir. 1993) (statements that a younger person could do faster work and that plaintiff was an "old fart" were stray remarks insufficient to establish discrimination); *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992) (comments made by discharged employee's boss one year before discharging employee that he was sending the employee "three young tigers" to assist him, held too vague and remote in time to be probative of discrimination); *Guthrie v. Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991) (on three occasions the former president of the company remarked to the current president (and his son as well) that he needed to surround himself with people his age, held insufficient evidence of age discrimination because remarks made one year before employee's demotion); *Neely v. Delta Brick & Tile Co.*, 817 F.2d 1224, 1225 (5th Cir. 1987) (judgment n.o.v. affirmed for employer despite evidence that manager told plaintiff that the company "is bringing in new people and younger people"); *Elliot v. Group Medical & Surgical Serv.*, 714 F.2d 556, 565 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (jury verdict for plaintiff reversed despite statement of company president that he wanted "new blood" and a new "lean and mean" marketing team); *Stendebach v. CPC Int'l, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982) (directed verdict for employer affirmed despite statement by corporate representative that age might be a relevant factor in reduction-in-force). *See, e.g., Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538 (8th Cir. 1991); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989); *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610-11 (11th Cir. 1987).

from evidence cannot be considered a clear abuse of discretion. Indeed, Morris' comments are correctly viewed as merely descriptive and devoid of discriminatory animus.[21]

Recognizing the vagueness of these comments, the district court observed that "old man" can be an endearing term as well as a discriminatory term. R.10: 114. The Fourth Circuit similarly observed:

> [S]tatements about age may well carry the same animus as those about race or gender. Unlike race or gender differences, age does not create a true we/they situation – barring unfortunate events, everyone will enter the protected age group at some point in their lives.

Birckbeck v. Marvel Lighting Corp., 30 F.3d at 512. Like the defendant in *Birbeck*, Bruntrager, at 57, was himself in the protected category. Morris' alleged stray remarks were indefinite and remote from the decision to eliminate Mitte's territory, thus, the remarks are not probative of a discriminatory motive. In context of the relevant cases, it is clear that the district court did not abuse its considerable discretion in excluding the stray remarks from evidence.

E. Morris was not directly responsible for the decision to eliminate Mitte's territory.

The decision to eliminate Mitte's territory was made by Bruntrager – not Morris. Morris' sole involvement in Mitte's termination was his recommendation to Bruntrager that certain sales territories be eliminated. This recommendation followed Bruntrager's direct request to Morris that he submit suggestions for cost cutting measures. Because Morris did not have the

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[21] *See, e.g., Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (manager's comment that employee "moved in slow motion" and was the same age as the manager's father considered merely descriptive and not discriminatory).

authority to discharge Mitte, his stray remarks would only be probative if they had been made "in [Bruntrager's] presence and with his knowing acquiescence." *See Fowler*, 799 F.2d at 984. There is no evidence that this occurred.

The Fifth Circuit holds that age-related remarks by a supervisor are admissible even if the supervisor did not make the ultimate decision to discharge the employee. 27 F.3d at 1094. The court relies on its decision in *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir 1991), to support its conclusion that Morris' age-related remarks should have been admitted. *Wilson* does not support the court's conclusion. First, Monarch Paper argued on appeal that the court should set aside the jury's verdict for Wilson finding age discrimination and that it was entitled to a directed verdict or a judgment n.o.v. *Id.* at 1146. Second, the evidence of age discrimination included, *among other significant evidence*, that Wilson's superiors, Bisbee and Gozon, *conspired* from the beginning to get rid of Wilson. *Id.* at 1140. Furthermore, Bisbee prepared a long-range plan which made numerous references to bring in "new blood" and to develop a "young team." *Id.* Gozon, who reassigned and demoted Wilson from a vice president position to working in the warehouse at an entry-level position, received the plan and expressed no dissatisfaction with the goals. *Id.* However, the Fifth Circuit was not asked to address the admissibility of any age-related comments made by *any* Monarch Paper employees. After evaluating the evidence, the court found that "[t]here were clearly two sides to this case" and the jury believed Wilson; therefore, the judgment was affirmed.

Here, there is no analogous relationship or conspiracy between Bruntrager, who made the decision to eliminate Mitte's territory, and Morris, to whom the allegedly age-related remarks are attributed. Contrary to the facts in *Wilson*, there is no evidence to suggest that Bruntrager, from the inception of Mitte's employment, endorsed firing Mitte for age-related discriminatory reasons. The court simply takes language out of context in the *Wilson*

decision and concludes that Morris' stray remarks were admissible. Contrary to the Fifth Circuit's conclusion, many courts have found age-related remarks not to be probative of discriminatory intent even when the remarks were made by a direct supervisor, and even when they were made at or near the time of firing.[22]

F. The Fifth Circuit's opinion compels the admission of stray remarks.

The Fifth Circuit erroneously focuses upon the admissibility of stray, age-related remarks generally. 27 F.3d at 1093. The opinion reads:

> In all the 'stray remark' cases referred to in the defendant's brief, the court merely held that remarks remote in time or made by those down the employer's hierarchy are alone insufficient to establish age discrimination. [citations omitted]. . . . Importantly, these cases [addressing the sufficiency of the evidence] did admit the stray remarks as relevant. **The only remaining question for the court was whether the stray remarks supported a finding of discrimination. This is a question of fact and by excluding the evidence of stray remarks as a matter of law,**

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[22] *See, e.g., Waggoner v. City of Garland*, 987 F.2d at 1166 (comments by supervisor who discharged plaintiff that he was an "old fart" and that a younger person could do work faster, held insufficient); *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541-42 (supervisors age-related comments to plaintiff, held insufficient); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (stray remarks, even when made by the decisionmaker, held not probative); *Young v. General Foods*, 840 F.2d 825, 829 (11th Cir. 1988) (age-related comments about plaintiff, held insufficient); *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610-11 (11th Cir. 1987) (age-related comments made by manager who fired the plaintiff, held insufficient); *Phipps v. Gary Drilling Co.*, 722 F. Supp. 615, 624 (E.D. Cal. 1989) (age-related comments made by manager who fired the plaintiff, held insufficient).

the trial court improperly usurped the role of fact finder.

Id. (emphasis added). The court is simply incorrect. The opinion wrongly assumes that the district court exercises no discretion under Rule 403 to exclude "stray remarks." The opinion takes from the district court the discretion to balance the probative value of the evidence versus the danger of unfair prejudice under Rule 403. The opinion further holds that to exclude such a remark would be "improperly usurp[ing] the role of fact finder." *Id.*; *cf. Price Waterhouse v. Hopkins*, 109 S. Ct. at 1804 (O'Connor, J., concurring). It is doubtful that the Fifth Circuit intended to take from the district court the power to evaluate evidence under Rule 403 (probative value vs. unfair prejudice, etc.) and to exercise its discretion in admitting or excluding that evidence. As a matter of fact, it is the district court's duty to evaluate the evidence tendered under Rule 403 and determine if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or the presentation of needless cumulative evidence.

In light of the well-established rule that stray, age-related remarks are insufficient to establish age discrimination,[23] it is difficult to understand why such evidence – which is insufficient to support a finding of age discrimination – **must** be admitted into evidence. It is illogical, and the reasoning is circular, to conclude that "stray

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[23] The Fifth Circuit has repeated that when age-related comments are

> 'vague and remote in time and administrative hierarchy,' they are no more that 'stray remarks,' which are insufficient to establish discrimination.

E.g., Atkin v. Lincoln Property Co., 991 F.2d 268, 272 (5th Cir. 1993); *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1450 (5th Cir. 1992); *Guthrie v. Tifco Indus., Inc.*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992).

remarks" *must* be admitted into evidence if such evidence will, in any case, not support a finding of age discrimination. Rule 403 was designed to give the district courts the discretion to exclude such evidence to avoid the dangers of unfair prejudice and confusion of the issues.

The court's opinion also certainly impedes and conflicts with the ability of a district court to grant a summary judgment or a directed or instructed verdict in an ADEA suit in which a plaintiff pleads any age-related remarks. Given the Fifth Circuit's clear pronouncement in footnote 2, a district court could not legitimately grant such a judgment to an employer if the plaintiff presented evidence of stray remarks. If the evidence (albeit "relevant") is neither competent nor sufficient to support an age discrimination finding, then the exclusion of such stray remarks from evidence under Rule 403 cannot constitute an abuse of discretion.

II. Even if the Stray Remarks Were Improperly Excluded, the Exclusion Did Not Effect Mitte's "Substantial Rights" or Result in Substantial Prejudice to Mitte.

Without explanation, the Fifth Circuit concludes that the exclusion of the two age-related remarks "could directly impact the ability of Mitte to enforce his rights" at trial. 27 F.3d at 1094. Then, the court leaps forward in dramatic fashion and suggests that the exclusion of the remarks "would be a potent weapon possessed by employers intent on the destruction of the program posited and supported by the ADEA." *Id.*[24]

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[24] It is difficult to reconcile Judge Goldberg's strong comments in the opinion at issue with another panel opinion in which he participated. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812 (5th Cir. 1993). In *Moore*, the Fifth Circuit observed that

> the ADEA was not created to redress wrongful discharge simply because the terminated worker was over the age of forty. **A discharge may be well unfair**

Set forth below, Manville identifies those age-related remarks **introduced** into evidence and those remarks **excluded** from evidence to demonstrate that the exclusion of the evidence could not have effected Mitte's "substantial rights" or resulted in substantial prejudice to him. First, the excluded remarks are cumulative of evidence admitted during trial. Second, Mitte wholly failed to tie the remarks to any particular time or place (*i.e.*, relevant to the discharge). Third, the jury heard ample evidence from Mitte that suggested Manville discriminated against Mitte based upon his age. Given the evidence that the jury did hear, it is extremely doubtful that the jury would have reached a different decision. Moreover, the evidence is clearly cumulative of evidence admitted at trial.

EVIDENCE ADMITTED	EVIDENCE EXCLUDED
Mitte testified that when Morris told him his position had been eliminated, he said, "well it looks like you finally got to us older guys," and Morris allegedly said, "you can put it that way." R.10: 77; R.11: 8, 10.	Morris stated that Mitte was incapable. R.10: 112-13; 27 F.3d at 1093. *[This evidence does not equate to an age-related remark, but the court recites this remark as one of the remarks erroneously excluded].*

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or even unlawful yet not be evidence of age bias under the ADEA. To make out an ADEA claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age.

Id. at 819 (Wiener, J., joined by Goldberg and Garwood, JJ.).

Charles Garrett (age 55), also "terminated" by Morris, read from a letter he wrote to Mitte in which he pondered whether he was terminated due to his age. R.11: 161; PX 84.

Morris stated that Mitte was old and inflexible. R.10: 112-13; 27 F.3d at 1093.

Alma Ruth Eastland, secretary to Morris, testified (contrary to a previous affidavit) that she thought that age was a factor in Morris' decision to eliminate her position. R.11: 172-73, 182, 189.

During a dinner with Margaret Cole, Morris bragged "about how he jumped that old man about smoking his pipe." R.10: 112-13; 27 F.3d at 1093.

Margaret Cole, a former Manville employee, testified that Morris told her that certain sales representatives were "inflexible" with their schedules and that these sales representatives were over the age of 50. R.12: 27.

One time Morris pulled down Mitte's winter hat and said "old man's hat". R.10: 112-13; 27 F.3d at 1093.

Cole stated that Morris said that he could run the sales territory with Sid Taylor, Lorin Lichten, and Chuck Hinton, and that they were in their 20's or 30's. R.12: 46.

Morris stated that Mitte was a dummy. R.10: 112-13; 27 F.3d at 1093. *[This evidence does not equate to an age-related remark and was not mentioned in the court's opinion].* Cole testified that she thought Morris got along better with the younger sales representatives. R.12: 28-29.

Cole opined that Morris used Mitte's age as a factor in his evaluations of Mitte. R.12: 36.

Cole said that Morris told her, a few weeks before Mitte's position was eliminated, that he was going to fire Mitte because "he was inflexible, that he was – I don't know if he used the exact words older at the time, but it was my perception." R.12: 45.

Shirley Hoehn, chief of customer service for Manville, testified that most of the sales representatives Morris had problems communicating with were over 50. R.12: 61.

Mitte's performance appraisals admitted into evidence are replete with references of Mitte needing to be more "flexible, versatile and creative." R.11: 45-47, 49, 53.

Morris' memo to Bruntrager which refers to Mitte's territory going to a "young aggressive sales rep." and referencing Mitte's age and offer of early retirement. DX 123.

It is clear from a comparison of the evidence admitted and the few stray remarks excluded that the district court's ruling could not have resulted in any substantial prejudice to Mitte. The evidence is cumulative and it is not tied to time or place. It cannot be argued that the admission of the excluded remarks, in view of the entire record, would have caused the jury to reach a different conclusion.

III. Considering the Charge as a Whole, the Special Interrogatory to the Jury Could Not Have Misled the Jury.

In analyzing the district court's interrogatory to the jury, the Fifth Circuit overlooked the fact that the decision facing Manville was one concerning realignment of territories. In other words, it was a decision about the realignment of territories which effected people, but it was not a decision about terminating specific people which then effected the territories. As set forth previously, the decision was made to realign Mitte's territory into the other two territories; however, it was not a decision to terminate Mitte and then realign the territories.

The interrogatory at issue reads:

> Do you find from a preponderance of the evidence that the defendants, through the conduct and statements of its [sic] officers, agents and employees, discriminated against the plaintiff on account of his age when the defendants realigned the Texas sales territories?

R.6: 1325.

The Fifth Circuit set forth a two-part test for challenging a jury question. First, the complaining party must first establish that the charge as a whole creates a substantial and eradicable doubt whether the jury has been properly guided in its deliberations. *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). Second, even if the question is erroneous, the court will not reverse if the court determines, based upon the entire

record, that the challenged question would not have affected the outcome of the case. *Id.*

When the jury question is read in context of the one and one-half pages of instructions immediately preceding it, R.6: 1323-25, and "in conjunction with the general charge, the interrogator[y] adequately presented the contested issues to the jury." *LeBoeuf v. K-Mart Corp.*, 888 F.2d 330, 334 (5th Cir. 1989) (quoting *Dreiling v. General Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975)).

The EEOC argued, and the Fifth Circuit agreed, that the interrogatory required Mitte to prove that the decision to have a reduction-in-force was discriminatory, when what the EEOC and Mitte actually sought to prove as discriminatory was the decision to terminate Mitte, rather than a younger worker. 27 F.2d at 1096. In its charge to the jury, however, the district court specifically stated that

> [d]uring the trial, Plaintiffs EEOC and Mitte have not challenged the economic necessity of Defendants' reduction in force, but *have instead argued that Defendants should have retained Mitte and discharged either Charles Hinton or Lorin Lichten.*

R.6: 1315 (emphasis added).

While the jury charge does state that Mitte must prove that the decision to discharge him, rather than a younger employee, was discriminatory, it does *not* state that Mitte was required to prove that the reduction-in-force or realignment of sales territories was discriminatory. Likewise, neither the instructions preceding the interrogatory nor the special interrogatory require Mitte to prove that the reduction-in-force or realignment was discriminatory. The special interrogatory merely required the jury to decide if the conduct and statements of Manville manifested age discrimination against Mitte when he was terminated at the time of the realignment. Reviewing the charge as a whole, the Fifth Circuit could not reasonably conclude that the it had a "substantial and ineradicable doubt whether the jury [was] properly

guided in its deliberations." 27 F.3d at 1097 (citing *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985)). Because the charge and interrogatory adequately presented the contested issue to the jury, the district court did not abuse its discretion. *Barton's Disposal Serv., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1435 (5th Cir. 1989).

CONCLUSION

Manville Corporation and Manville Sales Corporation, requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, that this Court reverse the judgment of the Fifth Circuit and affirm the judgment of the district court.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

BRIAN S. GREIG
600 Congress Avenue,
Suite 2400
Austin, Texas 78701
Telephone: (512) 474-5201
Telecopier: (512) 320-4598

W. WENDELL HALL
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792
Telephone: (210) 224-5575
Telecopier: (210) 224-8336

Counsel for Petitioners,
Manville Sales Corporation and
Manville Corporation

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

MANVILLE SALES CORPORATION, et al., Defendants-Appellees.

Charles MITTE, Plaintiff-Appellant,

v.

MANVILLE SALES CORPORATION,
Defendant-Appellee.

No. 93-1069.

United States Court of Appeals,
Fifth Circuit.

Aug. 4, 1994.

Equal Employment Opportunity Commission (EEOC) and former employee brought age discrimination action against employer. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., entered judgment in favor of employer, and appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) evidence that employee's supervisor made negative remarks about employee's age was relevant; (2) EEOC letter of violation was properly excluded as prejudicial; and (3) special interrogatory requiring jury to determine whether employer discriminated against employee on account of his age when it realigned employee's sales territory was erroneous.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

GOLDBERG, Circuit Judge:

Charles Mitte and the Equal Employment Opportunity Commission ("EEOC") brought the instant lawsuit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34. The plaintiffs alleged that Mitte had been discriminatorily discharged by his employer, Manville Sales Corporation ("Manville"), in violation of the ADEA. After a jury trial, the district court entered judgment in favor of Manville. The plaintiffs appeal. They contend that during the trial, the district court improperly excluded, *inter alia*, evidence of age-related remarks uttered by the employer. The plaintiffs also argue that the jury charge was erroneous in several respects. Our review convinces us that the plaintiff's primary contentions are essentially correct, that the judgment of the district court must be reversed, and, that this case must be remanded for further proceedings in the trial court.

I. Background

Mitte began his career with Manville in 1962. He worked as a sales representative selling Fiberglass insulation products. In the early 1980's, Manville encountered intense financial difficulties related to increased competition in the insulation industry and massive tort liabilities incurred by the company. As a result, Manville embarked on a series of cost-cutting measures. These measures included the discharge of a significant number of sales representatives.

In 1982, Lonnie Morris became District Manager of the district that included Mitte's territory. Morris administered the restructuring of that district with the aim of enhancing productivity and reducing costs. The district included two other territories in addition to Mitte's, each of which was served by a separate sales representative. Morris recommended to Robert Bruntrager, the General Sales Manager for the entire Fiberglass sales group, that Manville eliminate one of the sales representatives in this district and divide his responsibilities between the two remaining representatives. Morris also suggested that Bruntrager select Mitte as the employee who, as a result, would be terminated. Morris mentioned Mitte's age at the time, 55 years, and contrasted him with Lorin Lichten, age 32, whom Morris described as a "young aggressive sales rep".

In January of 1986, Bruntrager, having made little follow up investigation into Morris' recommendations, discharged Mitte and reapportioned his sales territory between Lichten and the other sales representative in the district, Charles Hinton, age 41.

Five months after his termination, Mitte began working with another insulation distributor. Shortly thereafter, in August of 1986, Mitte moved to New Jersey for a short stint with an insurance company. While in New Jersey, Manville offered Mitte the opportunity to interview for a sales representative position which had become available in Chicago. Mitte refused this offer. In February of 1988, he returned to Texas where he began working for a clothing store. In May of 1991, Mitte interviewed for a sales position with Manville in San Antonio. Although he

did not receive a job after this interview, in December of 1992, Manville rehired him for a position in Dallas.

On March 15, 1988, after his original discharge by Manville, Mitte filed the instant age discrimination suit. The EEOC filed a separate action against Manville in December of the same year. The two cases were subsequently consolidated. In their suit, the plaintiffs charged that in the years leading up to Mitte's termination, he outsold the two younger sales representatives retained by Manville and that he was terminated because of his age.[1] Manville responded that its financial problems necessitated a reduction in the sales force and that it selected Mitte because he was the least effective sales representative in the area. In particular, Manville, contended that Mitte had problems getting along with certain customers, that he could not handle large volume accounts, that his expenses were too high, and that he was too inflexible to grasp the opportunities that had become available in the field.

During the trial, the judge granted the defendant's motion *in limine* and excluded any testimony regarding age-related remarks made by Morris over the four years that he was Mitte's District Manager. The court also granted the defendant's request to exclude a letter of violation issued by the EEOC after an investigation of Mitte's claim Mitte and the EEOC now assert that both these evidentiary rulings were erroneous.

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[1] It is evident from the record, however, that sales for all three sales representatives declined consistently over the four year period prior to Mitte's discharge.

The plaintiffs also contend that the jury instructions were faulty in various ways. The most serious alleged error occurred in the first of five special interrogatories given by the court to the jury. The interrogatory read:

> Do you find from a preponderance of the evidence that the defendants, through the conduct and statements of its officers, agents and employees, discriminated against the plaintiff on account of his age when the defendants realigned the Texas sales territories?

The plaintiffs timely objected to this interrogatory on the grounds that the question incorrectly focused on the decision to realign the territories rather than on the decision to select Mitte as the employee to be discharged. The jury was instructed that a negative answer to this interrogatory terminated their decision process and that, should they return such an answer, they need not answer any further questions.

The jury answered the above interrogatory "We do not". The trial court therefore entered judgment for the defendants.

II. Analysis

The EEOC and Mitte contend that the district court improperly excluded evidence of age-related remarks made by Morris and the EEOC's letter of violation. Further, the plaintiffs contend that the jury instructions misled the jury, improperly stated the law, and therefore provide an additional basis for reversal. We address each contention in turn.

A. Exclusion of Evidence

We begin by recognizing that the "trial court's discretion to admit or exclude evidence is generally broad, but competent evidence cannot be excluded without a sound and acceptable reason." *Davidson Oil Country Supply Co. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir.1990); *see also Folks v. Kirby Forest Ind. Inc.*, 10 F.3d 1173, 1181 (5th Cir.1994). Courts of Appeals are to review a district court's evidentiary rulings "only for abuse of discretion." *Johnson v. Ford Motor Co.*, 988 F.2d 573, 578 (5th Cir.1993). Federal Rule of Civil Procedure 61 requires that an error in the exclusion of evidence by the trial court should not be the basis for setting aside a verdict, "unless refusal to take such action appears to the court inconsistent with substantial justice." In order to vacate a judgment based on an error in an evidentiary ruling, "this court must find that the substantial rights of the parties were affected." *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 349 (5th Cir.1983). With the standard of review before us, we proceed to an analysis of the district court's decision to exclude the age-related remarks and the EEOC letter of violation.

i. Age-Related Remarks

Morris made the excluded age-related statements over the four year period during which he was the District Manager in charge of Mitte's territory. The excluded testimony (heard by the district court outside of the presence of the jury) was that Morris remarked that Mitte was incapable; that he was old and inflexible; that Morris had bragged about "how he jumped that old man about

smoking his pipe"; that he pulled down Mitte's hat and said "old man hat." The plaintiffs offered additional testimony, also excluded from the jury's consideration, that the above remarks exemplified the general tone of Morris' statements on the subject of age.

The precise reason why the lower court determined that this evidence should be excluded is not clear. "We may not disturb the district court's exclusion of the evidence, however, if that ruling can be upheld on other grounds, regardless of whether the court relied on those grounds." *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1207 (5th Cir.1986). We will therefore uphold the exclusion if the evidence is excludable on any defensible ground.

The possible bases for excluding the evidence are limited. We note that "[a]ll relevant evidence is admissible in a jury trial, F.R.Evid. 402, unless its probative value is outweighed by, for example, the danger of unfair prejudice or confusion of the issues, F.R.Evid. 403." *Davidson Oil*, 908 F.2d at 1244. The issue in this case, therefore, is whether Morris' age-related remarks were excludable as irrelevant or as causative of undue prejudice.

The standard for relevance is a liberal one. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. There can be no question that the excluded statements meet this standard. They are obviously relevant to a showing of age bias on the part of a

key figure in the decision to terminate Mitte and as such are admissible.

The defendant's argument, construed in its best light, is that the evidence was not relevant because the remarks were made over a four year period and because the plaintiffs failed to assign a date certain to their utterance. In addition, Manville argues that the statements were not relevant because they were not made by the person who was ultimately responsible for deciding to terminate Mitte. We cannot agree with either contention.[2]

The long period of time over which the remarks were made does not suggest that the evidence is not relevant.

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[2] The cases cited by Manville are not to the contrary. In all the "stray remark" cases referred to in the defendant's brief, the court merely held that remarks remote in time or made by those down the employer's hierarchy are alone insufficient to establish age discrimination. *See Atkin v. Lincoln Property Co.*, 991 F.2d 268, 272 (5th Cir.1993) (evidence that employer told employee that the employee was "getting up there in years" and that it would be good idea for him to retire is, without more, insufficient to allow a jury to find age discrimination); *Waggoner v. City of Garland*, 987 F.2d 1160, 1166 (5th Cir.1993) ("Mere stray remarks with nothing more, are insufficient to establish a claim of age discrimination."). Manville's cases are distinguishable from the instant decision in that they are sufficiency of the evidence cases that did not address the question of admissibility of stray remark evidence.

Importantly, these cases did admit the stray remarks as relevant. The only remaining question for the court was whether the stray remarks supported a finding of discrimination. This is a question of fact and by excluding the evidence of stray remarks as a matter of law, the trial court improperly usurped the role of the fact finder. The cases cited by Manville, therefore, do not support the district court's decision to exclude the stray remarks in the case before us today.

To the contrary, the long time period may indicate a pattern of discriminatory comments and as such are directly relevant to showing the existence of discriminatory motive on the part of Manville. The amount of time that had passed since their utterance is only pertinent to the weight to be assigned the evidence. This decision is for the finder of fact alone.

The defendant's other contention, that Morris was not a decisionmaker, simply contradicts the facts of this case. Manville argues that "Morris' sole involvement in Mitte's separation was his recommendation to Bruntrager that certain sales territory be eliminated." That this is a blatant misstatement of the record is demonstrated by a memorandum from Morris to Bruntrager which advocates the elimination of territories *and* specifies that "regrettably, I recommend that we offer Charles Mitte early retirement. . . . I regret having to force early retirement on anyone." Bruntrager acknowledged considering Morris' recommendations and independently performing only a perfunctory analysis of the various employees in making the decision to terminate Mitte. Although it is true that Morris did not formally make the final decision to discharge Mitte, the evidence makes clear that Morris recommended his discharge and that Bruntrager relied, to some degree, on that recommendation in making his decision. In *Wilson v. Monarch Paper Co.*, we held that age-related comments by various supervisors of the plaintiff would support a finding of discrimination even though a higher level official made the final decision to terminate him. 939 F.2d 1138, 1146 (5th Cir.1991). Thus, the argument that the evidence is irrelevant because Morris was not a decisionmaker must also fail since it is clear that,

regardless of his final authority, Morris was a significant participant in the decision to terminate Mitte.

Manville also asserts that the evidence was properly excluded because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." F.R.Evid. 403.[3] Manville has, however, failed to make any showing of prejudice or confusion that could arise out of the admission of evidence of Morris' age-related remarks. "Merely because the testimony is adverse to the opposing party does not mean it is *unfairly* prejudicial." *Davidson Oil*, 908 F.2d at 1245 (emphasis in original). We therefore find that Rule 403 cannot provide a basis for excluding Morris' remarks.

Having determined that the age-related remarks were improperly excluded, we must now address whether the exclusion effected the "substantial rights" of the plaintiffs. *Munn v. Algree*, 924 F.2d 568, 573 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 277, 116 L.Ed.2d 229 (1991) ("[C]ourts of appeals should not reverse on the basis of erroneous evidentiary rulings unless a party's 'substantial right' is affected."). This circuit has "stated repeatedly that '[a]n error is harmless if the court is sure, after reviewing the entire record, that the error did not

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[3] Fed.R.Evid. 403 reads in full:

Although relevant, evidence may be excluded if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

influence the jury or had but a very slight effect on its verdict.' " *Id.* at 573 (quoting *Pregeant v. Pan Am. World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir.1985)).

The excluded remarks in this case are directly relevant to Mitte's age discrimination claim. Their exclusion from the jury's consideration could directly impact the ability of Mitte to enforce his rights in this trial. In fact, the exclusion of this testimony would be a potent weapon possessed by employers intent on the destruction of the program posited and supported by the ADEA.

The plaintiffs' presented evidence that the excluded remarks, including Morris' use of the term "old man", and comments that Mitte was "old and inflexible", were reflective of the overall negative tone Morris employed in speaking about age. It is not necessary that the plaintiffs present videotapes of explicit exclamations that "we don't want old people in our company" to prove age discrimination. Evidence of vocalizations and verbalizations of the anti-age based feelings of a supervisor can be, and often are, used to prove unlawful discrimination.

In *Bienkowski v. American Airlines, Inc.*, this court held that with regards to various "stray" remarks made by the employer, "we are unwilling to assume that indirect comments about [plaintiff's] age and adaptability are not possibly probative of an unlawful discriminatory intent." 851 F.2d 1503, 1507 (5th Cir.1988). Because this sort of remark evidence can be highly probative of unlawful discriminatory intent, we cannot say with conviction that this evidence would not have affected the jury's determination. The decision to exclude testimony as to these remarks affected the plaintiffs' substantial rights and was

an abuse of discretion that requires us to reverse the judgment of the trial court. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 469 (5th Cir.1985).

ii. EEOC Letter of Violation

As to the exclusion of the EEOC letter of violation, Manville argues that this evidence was properly excluded under Fed.R.Evid. 403 because of the danger of unfair prejudice. In *Gilchrist v. Jim Slemons Imports, Inc.*, the Ninth Circuit held that an EEOC letter of violation is excludable because it "suggests that preliminarily there is reason to believe that a violation has taken place" and therefore results in unfair prejudice to defendant. 803 F.2d 1488, 1500 (9th Cir.1986). In response, the EEOC notes that this circuit considers EEOC determinations of reasonable cause (as opposed to the letter of violation at issue in *Gilchrist*) to be presumptively admissible because they are "so highly probative of [discrimination] 'that [their probity] outweighs any possible prejudice to defendant.' " *McClure v. Mexia Independent School District*, 750 F.2d 396, 400 (5th Cir.1985) (quoting *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972)).

The problem with the EEOC's argument is that in the instant case the lower court considered a letter of violation, similar to the letter involved in *Gilchrist* rather than the letters of reasonable cause which were evaluated in the *McClure* and *Smith* cases. This difference is significant because a letter of reasonable cause is more tentative in its conclusions whereas a letter of violation states the categorical legal conclusion that a violation has taken place. Additionally, we have held that the *McClure* and

Smith decisions should not "be read as leaving district courts without discretion under Rule 403 to exclude such reports if their probative value is substantially outweighed by prejudicial effect or other considerations enumerated in the rule." *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201-02 (5th Cir.1992). We agree with the Ninth Circuit's holding in *Gilchrist* that a letter of violation "represents a determination by the EEOC that a violation of the Act has occurred and thus results in a much greater possibility of unfair prejudice" and that "[t]he probative value of a letter of violation may not, in every case, outweigh the potential for prejudice." 803 F.2d at 1500. In the *de novo* adjudication conducted by the trial court in discrimination cases, the task of weighing a letter of violation's probity versus its possibility for prejudice is best left to the trial judge. Because the plaintiffs have failed to show that the exclusion of the letter of violation was an abuse of discretion, we let this ruling stand.[4]

B. Special Interrogatories

The Plaintiffs argue that the trial court erred in submitting a special interrogatory to the jury that required the jury to determine whether the defendants "discriminated against the plaintiff on account of his age when

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[4] The EEOC observes that the paragraphs stating the legal conclusion would be excised prior to the admission of the letter of violation thereby neutralizing the letter's prejudicial effect. Other paragraphs in the letter make the EEOC's conclusion inescapable, however, that Manville had violated the ADEA. The letter, for example, still reads, "the Commission will begin conciliation now with respect to the ADEA violation findings."

[they] realigned the Texas sales territories?"[5] According to the EEOC and Mitte, this interrogatory misdirects the jury's investigation from an inquiry into Manville's decision to discharge Mitte in particular to an exploration of the general business decision of Manville to initiate the reduction in force and realignment of sales territories.

The district court's instructions to the jury and special interrogatories are reviewed for abuse of discretion. *Le Boeuf v. K-Mart Corp.*, 888 F.2d 330, 334 (5th Cir.1989). Although we afford broad discretion in fashioning jury instructions, the trial court must nevertheless "instruct the jurors, fully and correctly, on the applicable law of the case, and . . . guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth." *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir.1993) (quoting 9 Wright & Miller, *Federal Practice and Procedure* § 2556 (1971)). "On appeal,

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[5] The EEOC and Mitte also argue that the jury charge erroneously requires the plaintiffs to show that Mitte was "*clearly* better qualified" than those employees retained during the reduction-in-force at Manville. (emphasis in original). A showing that a discharged employee was clearly better qualified than younger retained employees is merely one of many ways that a plaintiff can show that a reduction-in-force was a mere pretext for age discrimination. *See Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir.), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2448, 104 L.Ed.2d 1003 (1989) (employee may prove pretext in reduction-in-force case by showing preferential treatment of younger employees prior to discharge of older employee); *Walther v. Lone Star Gas. Co.*, 952 F.2d 119, 124 (5th Cir.1992) (statistical information sufficient to prove pretext and support verdict for plaintiff in reduction-in-force context). The EEOC and Mitte may prevail without a showing that he was clearly better qualified than those employees who were not terminated.

the charge must be considered as a whole, and so long as the jury is not misled, prejudiced, or confused, and the charge is comprehensive and fundamentally accurate, it will be deemed adequate and without reversible error." *Davis v. Avondale Industries, Inc.*, 975 F.2d 169, 173-74 (5th Cir.1992). The plaintiffs properly objected below and now complain on appeal about the alleged error in the special interrogatories.

The EEOC and Mitte complain that the allegedly erroneous interrogatory requires the jury to find for the plaintiffs only if it finds discrimination in the general decision to realign the territory instead of in the specific decision to terminate Mitte.[6] We agree. As we explained in *Thornbrough v. Columbus and Greenville Railroad Co.*, the trial court in reduction in force cases is to "focus not on why employees, in general, were discharged, as the district court did, but instead why the plaintiff rather than another employer was discharged." 760 F.2d 633, 644 (5th Cir. 1985). Under the case law of this circuit, therefore, the instruction was improper.

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[6] Manville contends that the special interrogatory does not "require Mitte to prove that the reduction-in-force was discriminatory." It argues that the interrogatory instead requires Mitte to prove that the defendant's conduct "at the time of the realignment manifested age discrimination." The text of the question, "Do you find from a preponderance of the evidence that the defendants . . . discriminated against the plaintiff on account of his age when the defendants realigned the Texas sales territories?" makes clear that the record does not support Manville's argument as to this point.

Manville argues that the jury charge required Mitte to show that he was "clearly better qualified" than Hinton or Lichten and thus the charge focused the jury on the issue of whether the decision to discharge Mitte in particular was discriminatory. Manville concludes that the jury charge mitigated any mistake in the interrogatory. As pointed out by Manville, special verdict questions are to be reviewed "as a whole and in conjunction with the general charge." *Le Boeuf*, 888 F.2d at 334 (quoting *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975)). In context, they argue, the jury was properly instructed.

Le Boeuf is not, however, analogous to the instant case. The jury charge in that case clarified issues left out of the interrogatory. 888 F.2d at 334. In the present case, the jury charge simply stands in contradiction to a misstatement of the law in the interrogatory. Manville's argument loses even more force when we consider that the erroneous interrogatory focused the many issues in the trial into a single jury question which determined whether or not Manville would be held liable. Further, the impact of the interrogatory's particular misstatement of the law was enhanced by the fact that a negative answer to the question terminated the jury's inquiry and obliged the trial court to enter judgment for the defendants.

We are compelled to reverse where "the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir.1985). We find that this is such a case and therefore

vacate the judgment on the basis of this error as well as the evidentiary problems described above.[7]

III. Conclusion

The errors committed by the trial court in excluding evidence of age-related remarks made by Mitte's manager and in misstating the law in the special interrogatories require this court to REVERSE the decision of the district court and to REMAND this case for further proceedings in accordance with this opinion.

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[7] We also note that the district court erred in its damages instruction to the jury. The court instructed the jury that it could not award backpay for any period after Mitte declined to interview for a position if the jury found the position to be substantially equivalent. This is a misstatement of the well-known rule that an employer may toll the accrual of backpay liability if the defendant offers the claimant an "unconditional offer of the job originally sought" *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232, 102 S.Ct. 3057, 3066, 73 L.Ed.2d 721 (1982). An offer of an interview is not tantamount to an unconditional job offer and therefore the plaintiff's refusal to interview does not automatically toll the plaintiff's accrual of damages. *See Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 879 (11th Cir. 1986) ("Since the plaintiffs were not offered employment, but simply the opportunity to apply for an unspecified number of jobs, we conclude that Bowman's offer did not satisfy the requirements of *Ford Motor Co.*"); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 625 (6th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1069

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

MANVILLE SALES CORPORATION, ET AL.,

Defendants-Appellees.

CHARLES MITTE,

Plaintiff-Appellant,

versus

MANVILLE SALES CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/4/94, 5 Cir., 1994, F.3d ___)

(September 6, 1994)

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as (a) Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is also DENIED.

( ) Treating the Suggestion for Rehearing En Banc as (a) Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Irving L. Goldberg
United States Circuit Judge

REHG-6
Rev. 7/1/94

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	§	CIVIL ACTION NO. 4:88-CV-905-K
VS.	§	CONSOLIDATED WITH
MANVILLE SALES CORPORATION, AND MANVILLE CORPORATION	§	CIVIL ACTION NO. 4-89-226-K
AND	§	(Filed Nov. 24, 1992)
CHARLES MITTE	§	
VS.	§	
MANVILLE SALES CORPORATION	§	

JUDGMENT

These actions came on for trial before the Court and a jury, Honorable David O. Belew, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

It is hereby ORDERED and ADJUDGED that the Plaintiffs take nothing, that the action be dismissed on the merits, and that each party shall pay his own costs of court.

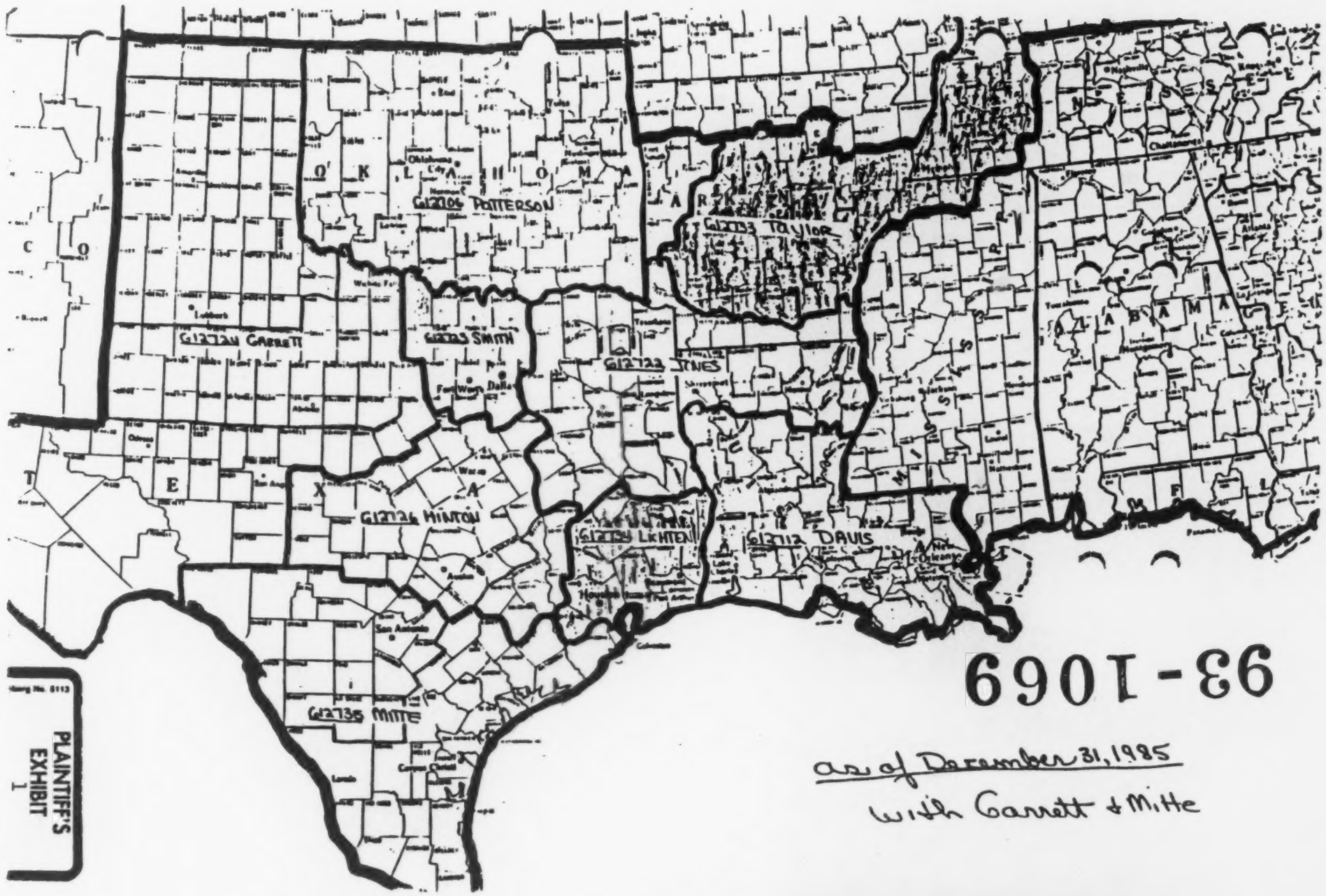
The Clerk of the Court is instructed to close these cases.

IT IS SO ORDERED.

SIGNED this 24th day of November, 1992.

Feb 19, 1993
D Duron

/s/ David O. Belew, Jr.
DAVID O. BELEW, JR.
United States District Judge



93-1069

as of December 31, 1985
with Garrett & Mitte

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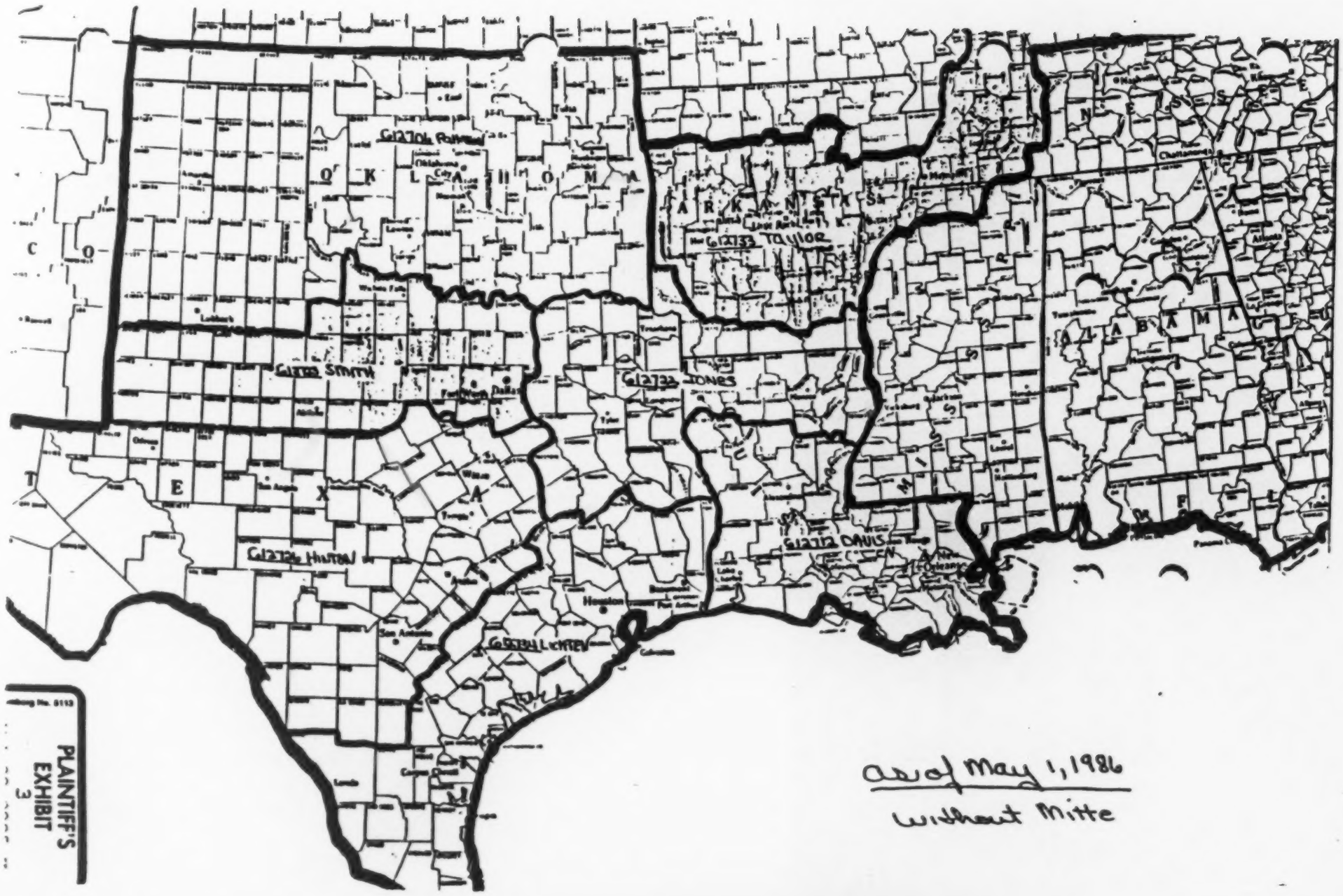

as of May 1, 1986
without Mitte

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Supreme Court, U.S.
FILED
FEB 6 1995
OFFICE OF THE CLERK

No. 94-1012

In the Supreme Court of the United States

OCTOBER TERM, 1994

MANVILLE SALES CORPORATION AND
MANVILLE CORPORATION, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district court's exclusion from the evidence at trial of age-based remarks made by a participant in an allegedly discriminatory discharge decision was an abuse of discretion that substantially affected the rights of respondents.

2. Whether the court of appeals erred in holding that a special interrogatory that improperly focused the jury's attention on the general business decision to reorganize certain sales territories, rather than on the specific decision to select respondent for termination, so misled the jury as to require reversal.

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Fed. R. Evid. 403	5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1012

MANVILLE SALES CORPORATION AND
MANVILLE CORPORATION, PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 27 F.3d 1089. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1994. A petition for rehearing was denied on September 6, 1994. Pet. App. 18-19. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Charles Mitte had sold building materials for petitioners since 1962. Pet. App. 2. In 1982, Lonnie Morris became District Manager of the district that included Mitte's sales territory. *Id.* at 3. As part of a company-wide effort to enhance productivity and reduce costs, Morris recommended to General Sales Manager Robert Bruntrager that petitioners eliminate one of the three sales representative positions in Morris's district, and divide the territory of the discharged salesperson between the remaining representatives. *Ibid.*

Morris recommended to Bruntrager that Mitte, then age 55, be dismissed, in favor of retaining younger employees. Pet. App. 2. In his recommendation, Morris specifically contrasted Mitte's age with that of a different salesperson, whom Morris described as a "young aggressive sales rep." *Ibid.* In January, 1986, Bruntrager followed Morris's recommendation and approved Mitte's discharge. *Ibid.*

Respondents Mitte and Equal Employment Opportunity Commission (EEOC) filed suit against petitioners under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, alleging discriminatory discharge based on age. Pet. App. 4. Petitioners argued that financial difficulties required a reduction in workforce, and that they selected Mitte for discharge because he was the least effective sales representative in his area. *Ibid.* Respondents did not dispute the economic necessity of a workforce reduction, but sought to prove that Mitte consistently outsold the other salespersons before his discharge, and that age actually motivated the termination decision. *Ibid.*

At trial, respondents attempted to introduce testimony from several witnesses that, during the four-year period when Morris supervised Mitte, Morris "remarked that Mitte was incapable; that he was old and inflexible; that Morris had bragged about 'how he jumped that old man about smoking his pipe'; that he pulled down Mitte's hat and said 'old man hat,'" and that such comments "exemplified the general tone of Morris's statements on the subject of age." Pet. App. 6-7. The district court granted petitioners' motion to exclude this testimony. *Id.* at 4.

Respondents also objected to a special interrogatory in the district court's jury charge. The interrogatory asked:

> Do you find from a preponderance of the evidence that the defendants, through the conduct and statements of its officers, agents and employees, discriminated against the plaintiff on account of his age when the defendants realigned the Texas sales territories?

Pet. App. 5. The court instructed the jury that a negative answer to this question ended their deliberations, and admonished the jury to refrain from answering further interrogatories if their response to this initial inquiry was "We do not." *Ibid.* The jury answered "We do not." to the special interrogatory, and the trial court entered judgment for petitioners. *Ibid.*

2. The court of appeals reversed and remanded. Pet. App. 1-17. The court held that the district court's exclusion from evidence of age-related comments by Mitte's supervisor was "an abuse of discretion" that "affected [respondents'] substantial rights" and required reversal. *Id.* at 11-12. Morris's age-based remarks, the court ruled, "are obviously relevant to a showing of age

bias on the part of a key figure in the decision to terminate Mitte and as such are admissible." *Id.* at 7-8.

The court also held that the trial court significantly misstated the law in its special interrogatory. The special interrogatory, the court concluded, erroneously required the jury to find in favor of petitioners only if it concluded that there was "discrimination in the general decision to realign the territory instead of in the specific decision to terminate Mitte." Pet. App. 15. Viewing the charge as a whole, the court was left "with [a] substantial and ineradicable doubt whether the jury ha[d] been properly guided in its deliberations," and therefore held that the erroneous interrogatory provided a second basis for reversal. *Id.* at 16-17 (quoting *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985)).

ARGUMENT

1. Petitioners argue that the court of appeals erred in reversing the district court's exclusion of Morris's remarks. This contention is without merit.

Although "stray remarks" are ordinarily insufficient, by themselves, to establish discrimination, remarks by decisionmaking officials "can certainly be evidence" that impermissible bias motivated an employment decision. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989); *id.* at 277 (O'Connor, J., concurring). Thus, "stray remarks" are admissible at trial, even when they do not independently prove discrimination. See *Cone* v. *Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994); *Hong* v. *Children's Mem. Hosp.*, 993 F.2d 1257, 1265 (7th Cir. 1993); *Atkin* v. *Lincoln Property Co.*, 991 F.2d 268, 272 (5th Cir. 1993); *Leichihman* v. *Pickwick Int'l*, 814 F.2d 1263, 1271 (8th Cir.), cert. denied, 484 U.S. 855 (1987).

Moreover, the district court did not exclude Morris's remarks because they were irrelevant, stray or remote. Rather, it excluded the testimony because it could not determine whether the term "old man" was intended to be "endearing" or "discriminatory." C.A. R.E. Tab 6., at 114. As the court of appeals correctly held, however, the meaning of the term "old man" as used by Morris was a factual question for the jury to resolve. Pet. App. 8 n.2.

The court of appeals correctly concluded that no legal grounds existed for the district court's exclusion of testimony about Morris's remarks. The remarks directly referenced Mitte's age.[1] They were made by Mitte's supervisor during a four-year period, the entire period of time during which Morris supervised Mitte, and indicate "a pattern of discriminatory comments." Pet. App. 9. In terminating Mitte, Bruntrager admittedly relied on Morris's recommendation. *Ibid.* See *Wilson* v. *Monarch Paper Co.*, 939 F.2d 1138, 1146 (5th Cir. 1991). Thus, the statements were not "stray" or remote, but were "directly relevant" to determining whether the decision to discharge Mitte was motivated by discriminatory bias. Pet. App. 11.[2]

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[1] Even indirect comments, however, are probative. See *Bienkowski* v. *American Airlines*, 851 F.2d 1503, 1507 & n.4 (5th Cir. 1988) (refusing "to assume that indirect comments about [plaintiff's] age and adaptability are not possibly probative of an unlawful discriminatory intent").

[2] Petitioners also argue that the court of appeals failed to recognize the district court's "broad discretion" to weigh the probative value of evidence against its prejudicial effect under Fed. R. Evid. 403. Pet. 16-17. However, the district court did not balance the competing considerations under Rule 403, and thus the court of appeals was not required to defer to the district court's judgment on that issue.

2. Petitioners also contest the court of appeals' conclusion that the special interrogatory, when read in the context of the charge as a whole, misstated the law to such an extent as to require reversal. This claim also is without merit.

In reduction in force cases, the proper inquiry in evaluating a claim of discriminatory discharge must focus on why the plaintiff, rather than a different employee, was discharged, and not on whether an employer was justified in implementing a general workforce reduction. *Robinson* v. *PPG Indus.*, 23 F.3d 1159, 1163 (7th Cir. 1994); *Gallo* v. *Prudential*, 22 F.3d 1219, 1226 (2d Cir. 1994); *Washington* v. *Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993).

The interrogatory in this case required the jury to find for petitioners only if it found discrimination in petitioners' general decision to realign Mitte's territory. The interrogatory incorrectly failed to require that the jury determine whether the specific decision to terminate Mitte was motived by discriminatory animus. See *Thornbrough* v. *Columbus & Greenville R.R.*, 760 F.2d 633, 644 (5th Cir. 1985). The court of appeals thus held that the instruction was legally erroneous.[3]

[3] Although petitioners claim that the court of appeals failed to apply the proper standard of review and thereby "depart[ed] from Fifth Circuit precedent," Pet. i, the court of appeals applied the legal standard urged by petitioners. See Pet. App. 16-17 ("[a] substantial and ineradicable doubt whether the jury ha[d] been properly guided in its deliberations") (quoting *Pierce*, 753 F.2d at 425); Pet. 28 (identifying proper standard as whether "the charge as a whole creates a substantial and eradicable [*sic*] doubt whether the jury has been properly guided in its deliberations"). In any event, any inconsistency in Fifth Circuit decisions would be a matter for that court, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Furthermore, while petitioners are correct that the instruction must be examined in the context of the charge as a whole, "the impact of the interrogatory's particular misstatement of the law was enhanced by the fact that a negative answer to the question terminated the jury's inquiry and obliged the trial court to enter judgment for [petitioners]." Pet. App. 16. Thus, in this case the other elements of the charge amplified, rather than diminished, the harm of the error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment
Opportunity Commission

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